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In the Supreme Court of the United States

No. 252

OCTOBER TERM, 1959.

JOSEPH D. MASTERSON,
Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

The opinion of the District Court on motion for new trial, so far as we know, is not reported in any official or unofficial reports. It appears, however, on pages 120a-124a, of the Record, nine extra copies of which are filed herewith. The opinion of the Court of Appeals is reported at 266 F. 2d 1, and is appended hereto at page 18.

The judgment sought to be reviewed was entered on May 5, 1959 (*infra*, p. 18).

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Where the Record shows that petitioner's complaint in an action under the Federal Employers' Liability Act of April 22, 1908 (Chapter 149, 35 Stat. 65; U. S. C. A. Title 45, Chapter 2, §§ 51-60) and the Federal Safety Appliance Act (Title 45 U. S. C. A., § 1 et seq.), and the

amendments thereto, alleged "unlawful conduct and negligence," that he testified at trial that on a dark and misty night, with his head, as his duty required, stuck out of the window of a caboose, looking at the 153-car moving train, he saw that from a part of the train under the exclusive control of respondent, and about 100 feet ahead of him, sparks appeared and then an object flew out, ricocheted on an adjoining parallel track, and an instant later struck him and knocked him unconscious (a period of unconsciousness variously estimated from one half hour to one and one-quarter hours) that for some 50 days immediately following the occurrence, he stated repeatedly that he did not know just what it was which struck him, that suddenly about 50 days after the occurrence, he remembered that it was a piece of a brake shoe that had hit him, and it is shown that eight days after the occurrence, in response to a question by respondent's investigator, petitioner stated that it was his idea or opinion that it was a part of a brake shoe that ricocheted off the rail and hit him, an utterance petitioner did not recall but did not deny, that no trains were moving on tracks in the immediate vicinity, that there were no close clearances in the area and the object which hit him was not found, did the trial court commit prejudicial error in refusing petitioner's request to charge on res ipsa loquitur as well as under the Federal Safety Appliance Act?

2. Where the trial court, having refused petitioner's request for a charge on res ipsa loquitur, submitted the case to the jury under the absolute liability doctrine of the Safety Appliance Act only, and counsel for petitioner, therefore, confined his argument to that issue alone, and the jury, during its deliberations, inquired in writing, "If we find the railroad not negligent, can we still award damages to Mr. Masterson? * * *", whereupon the Court,

after telling the jurors that it seemed to him that they had not paid any attention to "the charge of the court or the argument of counsel," again charged solely on absolute liability, and the jury, thereafter, returned a verdict for the defendant, did the trial court commit prejudicial error in denying petitioner's motion for new trial because petitioner was denied a fair trial by the jury, as evidenced by its question?

STATUTES INVOLVED.

Pertinent text of the Federal Employers' Liability Act, as amended (45 USCA § 51-60, 10 FCA title 45, § 51) reads:

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (§ 51.)
>
> "* * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee * * *." (§ 53.)
>
> "* * * such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *." (§ 54.)

Pertinent text of the Federal Safety Appliance Act, 45 U. S. C. A. 11; 160 § 2, 36 Stat. 298, reads: